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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

QUADRANT TECHNOLOGY CORPORATION, Plaintiff and Respondent, v. MIASOLÉ HI-TECH CORPORATION, Defendant and Appellant.	H044777 (Santa Clara County Super. Ct. No. 15-CV-288854)

MiaSolé Hi-Tech Corporation (MiaSolé) appeals from a judgment confirming an arbitration award in favor of Quadrant Technology Corporation (Quadrant) in a contract dispute. MiaSolé argues that the arbitration award should be vacated pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(1) and (4),[1] or corrected pursuant to section 1286.6, subdivision (b), because the arbitrator exceeded his powers when selecting a remedy for the contract breach and because Quadrant attained the award by fraud. MiaSolé also appeals the trial court's order denying its motion for a "new trial" pursuant to section 657 and requests that this court grant its motion to take additional evidence supporting its contention that Quadrant committed fraud. We find no error in

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the trial court's judgment and orders and deny MiaSolé's motion to take additional evidence.

I. FACTS AND PROCEDURAL BACKGROUND

MiaSolé makes solar cell products. Quadrant designs, manufactures, and supplies magnets and other components used in solar products. MiaSolé agreed to purchase from Quadrant a number of magnetic assemblies, which the parties refer to (as do we) as "mag packs." The mag packs were customized and built to MiaSolé's specifications. MiaSolé and Quadrant memorialized the transaction in three purchase orders that provided that Quadrant would supply MiaSolé with a total of 957 mag packs over the course of several months for approximately $6.8 million.[2] MiaSolé issued the terms of the purchase orders, which were written on MiaSolé letterhead. The purchase orders provided that Quadrant was to pay for the cost of shipping the mag packs to MiaSolé and that "any controversy, claim, or action" arising out of the purchase orders would be settled by arbitration.

The terms of arbitration, which appeared on the back of the purchase orders, provided, "Any controversy, claim, or action, whether in law or at equity, whether in tort, contract, warranty or otherwise, arising out of, relating to, or involving this Order and any agreement, undertaking, or performance that may be promised, performed, or executed to implement this Order will be settled by arbitration. Any arbitration proceeding shall be conducted under the laws of the State of California and the Federal Arbitration Act, and pursuant to the Commercial Arbitration Rules of the American Arbitration Association insofar as such Commercial Rules do not conflict with the provisions of this Section. The site for any arbitration proceeding shall be in San Jose, California."

[2] The total purchase price for the mag packs covered by the three purchase orders was $6,847,838.25. The first purchase order was for 297 mag packs, and the second and third purchase orders were for 330 mag packs each. Although other purchase orders appear in the record, only these three purchase orders are relevant to this appeal.

Several months after the issuance of the purchase orders but before any of the mag packs had been shipped to MiaSolé, MiaSolé wrote to Quadrant and stated that it was placing its orders "on hold" and asked Quadrant to stop work on them. After receiving MiaSolé's request to stop work on the orders, Quadrant filed suit in the trial court for breach of contract, among other claims, and sought damages and other relief. In response, MiaSolé filed a petition to compel arbitration arguing that the "the entire case" was for "an arbitrator to decide." The trial court granted MiaSolé's petition to compel arbitration.

Quadrant and MiaSolé submitted the dispute to arbitration. Prior to the arbitration hearing, the parties engaged in discovery. In the course of that discovery, MiaSolé deposed a Quadrant employee who testified that the mag packs from the first two purchase orders were "assembled and ready to ship" and that the third purchase order was "approximately 70 percent complete." Counsel for MiaSolé asked the witness about the number of mag packs completed at the time the purchase orders were placed on hold, asking, for example, "Did the factory ever send another e-mail saying that additional sets—additional assembles have been comp [*sic*] finished production?" The Quadrant witness responded, "Yeah. We have been in touch with the factory about them." Counsel for MiaSolé did not ask the witness any follow-up questions about Quadrant's communications with its factory on the number of mag packs Quadrant had completed in fulfillment of MiaSolé's order.

After discovery had been completed, the arbitrator conducted a two-day arbitration hearing, during which several witnesses testified, and both parties submitted documentary evidence. The arbitrator subsequently issued an order reopening the hearing allowing the parties the opportunity to present evidence about the costs Quadrant would have incurred "in delivering completed mag packs if both parties had fulfilled their obligations under the three purchase orders at issue." Both sides presented additional evidence.

The following month, the arbitrator issued a written award in favor of Quadrant that found that MiaSolé had breached the contract set out in the purchase orders. The award described the "undisputed facts" that Quadrant had not shipped any of the completed mag packs to MiaSolé, and that the mag packs had no salvage or resale value. Among other findings, the arbitrator stated that a MiaSolé executive had testified that "she knew of no plans or even internal discussions" about reinstating the delivery dates for the mag packs. The arbitrator also found that "reinstating delivery after 18 months would likely be commercially impractical given the march of solar technology and geopolitical changes over such an extended period."[3] The award did not require Quadrant to provide the completed mag packs to MiaSolé.

Turning to damages, the arbitrator observed that the parties had "presented a potpourri of conflicting evidence and swirling theories as to how much Quadrant should be recompensed for MiaSolé's decision to delay and stop deliveries . . . before any of the ordered 957 units were ever delivered. Much of that revolved around how many units Quadrant was ready to and would have shipped" but for the "stop-work orders." After noting that Quadrant had submitted evidence that it had completed production for two of the three purchase orders and that MiaSolé did not rebut that evidence, the arbitrator concluded that "the weight of the evidence supports [Quadrant's] contention" that it had completed production on the first two purchase orders and it had completed 70 percent of the units ordered under the third purchase order when MiaSolé's "stop-work email arrived."

In awarding damages, the arbitrator relied on his "authority under Rule 47(a) of the American Arbitration Association (AAA)'s Rules to 'grant any remedy or relief that

[3] Both Quadrant's assembly plant for the mag packs and MiaSolé's manufacturing plant that would have used the mag packs were located in China, although the terms of the purchase orders required the mag packs to be delivered to MiaSolé's offices in the United States.

the arbitrator deems just and equitable.' " Although Quadrant argued it was entitled to the entire price of the mag packs because it had substantially completed performance under the contract, the arbitrator rejected that argument and awarded Quadrant $4,105,436.77. That amount represented a deduction of $2,054,351.48, the amount that MiaSolé had already paid Quadrant when it originally placed the orders, from the total contract amount of $6,847,838.25, as well as an additional reduction based on the arbitrator's finding that Quadrant had completed only 70 percent of the mag packs from the third purchase order. The arbitrator further reduced the award by $267,277 for the shipping costs Quadrant would have incurred had it delivered the mag packs to MiaSolé. Ultimately, the award ordered MiaSolé to pay Quadrant $3,838,160 without interest, as well as $7,350 in administrative fees.

A few weeks after the arbitrator issued the award, MiaSolé sought a "clarification" of Quadrant's "obligation" to "hold" the completed mag packs for MiaSolé pursuant to Commercial Code section 2709, subdivision (2) in order for MiaSolé to obtain possession of them. Quadrant opposed the request. The arbitrator issued a written response denying MiaSolé's request and stating, "while characterized as a 'request for clarification' of the Award, [the request] essentially raises new arguments on the merits and seeks a change in the Award as issued." The arbitrator further noted that the matter raised by MiaSolé "was fully aired and briefed prior to the final Award."

Quadrant filed a petition in the trial court to confirm the arbitration award. MiaSolé filed an opposition to Quadrant's petition, as well as a competing petition to correct or, alternatively, to vacate the award on the ground that the arbitrator's remedy amounted to a "windfall" for Quadrant because the award gave Quadrant a greater recovery than it would have received through full performance of the contract. MiaSolé also filed in the trial court a "supplemental memorandum" seeking to vacate the award on the ground of fraud, claiming that Quadrant wrongfully procured the award through the perjury of one of its employees, who allegedly lied about the number of mag packs that

had been completed.[4] In its supplemental memorandum, MiaSolé also sought further discovery of the number of mag packs Quadrant had manufactured in fulfillment of MiaSolé's purchase orders. To support its request for further discovery, MiaSolé provided the declaration of its counsel, who testified that Quadrant's counsel had refused to provide "photographic proof" that the mag packs existed.

The trial court issued a written order denying MiaSolé's request to correct or, alternatively, to vacate the award. In its order, the trial court stated that the arbitrator "had the authority to decide whether or not MiaSolé was entitled to the products it now claims it wants" and noted that the arbitrator had reduced Quadrant's award—based upon "MiaSolé's representations that it did not want the products"—by $267,277 for shipping costs that Quadrant would otherwise have incurred. The court further found that the arbitrator "previously denied MiaSolé's request for 'clarification' of these same issues," and concluded that MiaSolé's argument that "the remedy employed by the Arbitrator is not rationally related to the breach is not persuasive." The trial court entered judgment confirming the arbitration award.

Shortly thereafter, MiaSolé filed in the trial court an ex parte application for a new trial based on "newly discovered" evidence consisting of a declaration from a MiaSolé employee, in which the employee testified as to statements made purportedly by an employee of the factory that assembled the mag packs for Quadrant to another MiaSolé employee. According to the declaration, an employee of the subcontractor told another MiaSolé employee that the subcontractor "never completed the production or assembly of the mag packs ordered by MiaSolé" under the three purchase orders. Before the trial court held a hearing on MiaSolé's new trial motion, MiaSolé filed a notice of appeal from the trial court's judgment confirming the arbitration award.

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[4] The claimed perjury pertained to the same witness and employee of Quadrant whose deposition testimony is excerpted above.

Approximately 10 days after filing its notice of appeal from the judgment, MiaSolé filed in the trial court a "motion for new trial" pursuant to section 657 arguing that the arbitration award had been procured by "intrinsic fraud" and claiming that Quadrant committed perjury during the arbitration. In support of its motion, MiaSolé submitted a declaration of a different MiaSolé employee that contained statements purportedly made to him by an employee of a factory that assembled the mag packs for Quadrant that "Quadrant's claim regarding the quantity of allegedly manufactured and fully assembled (858 claimed) mag packs was false." Quadrant opposed the motion. After a hearing on the motion, the trial court issued a written order that stated, "Having considered the papers on file and the arguments of counsel, the court rules as follows: [¶] The Motion for New Trial is Denied." The order did not provide a further explanation of the court's ruling.

In this court, MiaSolé has moved "for leave to produce additional evidence on appeal" pursuant to section 909 and rule 8.252(c)(3) of the California Rules of Court. The motion asks this court to consider a declaration from the "President and Chief Executive Officer" of the assembly manufacturer whose factory assembled the mag packs for Quadrant that, MiaSolé claims, demonstrates the award was "procured by fraud." Quadrant opposes the motion to produce additional evidence.

II. DISCUSSION

MiaSolé's contentions on appeal challenging the trial court's judgment confirming the arbitration award and its denials of MiaSolé's petition, motion for new trial, and request for discovery center on the number of mag packs Quadrant had actually manufactured and on the arbitrator's determination that Quadrant did not need to provide any of the completed mag packs to MiaSolé. We first address MiaSolé's challenges to the trial court's judgment confirming the arbitration award and the trial court's denial of MiaSolé's petition to vacate or correct the award. We then examine MiaSolé's appeal of

the trial court's order denying its motion for a "new trial." We conclude with a discussion of MiaSolé's motion for leave to take additional evidence.

A. *The Arbitration Award*

MiaSolé contends that the arbitration award should be vacated under section 1286.2, subdivision (a)(4) (hereafter section 1286.2(a)(4)) because the arbitrator exceeded his powers, first, by awarding Quadrant a remedy that it did not request—namely, both "the full contract price" and retention of the completed mag packs—and, second, by crafting a remedy that violated Commercial Code section 2709, subdivision (2) by not requiring Quadrant to "hold" the completed mag packs for MiaSolé. MiaSolé also argues that the award should be vacated under section 1286.2, subdivision (a)(1) (hereafter section 1286.2(a)(1)) because Quadrant procured the award through fraud by lying about the number of completed mag packs. In the alternative, MiaSolé argues based on the same grounds that the award should have been corrected under section 1286.6, subdivision (b) (hereafter section 1286.6(b)).[5]

Through the detailed legislative scheme governing arbitration, the Legislature has expressed a " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (*Moncharsh v. Heily & Blase* (1992) 3

[5] We note that we have jurisdiction over an appeal from a judgment confirming an arbitration award. (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087.) As part of an appeal from the judgment, we also have jurisdiction to review the trial court's order denying MiaSolé's petition to vacate or correct the award, (*Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1454) and order denying its motion for new trial. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) That the trial court issued its order denying the motion for new trial after MiaSolé had filed the notice of appeal does not affect our jurisdiction. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 191 ["[T]he Legislature, through its enactments, has established that a motion for a new trial is collateral to the judgment and may proceed despite an appeal from the judgment."]; see also *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18 ["An order denying a motion for new trial . . . may be reviewed on appeal from the underlying judgment."].)

Cal.4th 1, 9 (*Moncharsh*), citations omitted.) "[I]t is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Id.* at p. 11.) "The entire statutory arbitration scheme is designed to give the arbitrator the broadest possible powers." (*Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 210.) To that end, "the courts will not review the validity of the arbitrator's reasoning." (*Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1105 (*Royal Alliance*).) Judicial review is severely limited because that limitation "vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law." (*Moncharsh, supra,* 3 Cal.4th at p. 11.)

"Arbitration awards may be vacated in only one of six statutorily enumerated circumstances. (Code Civ. Proc., § 1286.2.)" (*Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538, 546.) An award may be vacated under section 1286.2 under only "very limited circumstances." (*Delaney v. Dahl* (2002) 99 Cal.App.4th 647, 654.) Unless falling within one of the circumstances set out in section 1286.2, an award may not be vacated even if it facially contains a legal or factual error that results in an injustice. (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1313.)

"On appeal from an order confirming an arbitration award, we review the trial court's order (not the arbitration award) under a de novo standard." (*ECC Capital Corp. v Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 900 (*ECC Capital*), citations and internal quotation marks omitted.) "To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues." (*Ibid*., internal quotation marks omitted.)

1. The Arbitrator's Authority

MiaSolé first claims the arbitration award should be vacated under section 1286.2(a)(4), which applies when "[t]he arbitrators exceeded their powers and the award

cannot be corrected without affecting the merits of the decision upon the controversy submitted." (§ 1286.2(a)(4).) MiaSolé argues that the arbitrator exceeded his powers in awarding a remedy that "was contrary to the law" and, more particularly, violated California Uniform Commercial Code section 2709, subdivision (2).[6]

"In determining whether an arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority." (*Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443–444.) "[A]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error . . . ." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 917, internal quotation marks omitted.)

With respect to an arbitrator's authority to fashion remedies, his or her choice of remedies "must bear some rational relationship to the contract and the breach. The required link may be to the contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract's general subject matter, framework or intent. The award must be related in a rational manner to the breach (as expressly or impliedly found by the arbitrator)." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381 (*Advanced Micro Devices*), citation omitted.)

Even accepting as true MiaSolé's claim that the award violated California Uniform Commercial Code section 2709, subdivision (2), the error would not provide a

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[6] That statute provides, "Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold." (Cal. U. Com. Code, § 2709, subd. (2).)

basis to vacate the award. The terms of arbitration set out in the purchase orders provided that "[a]ny arbitration proceeding shall be conducted under the laws of the State of California and the Federal Arbitration Act, and pursuant to the Commercial Arbitration Rules of the American Arbitration Association insofar as such Commercial Rules do not conflict with the provisions of this Section." The arbitration clause did not otherwise restrict the arbitrator's authority.

The provision in the arbitration clause that states that the proceeding "shall be conducted under the laws of the State of California" does not provide for judicial review of any claimed errors of California law made by the arbitrator. An arbitrator's decision cannot be reviewed for errors of law such as the one claimed by MiaSolé, even when the "error of law appears on the face of the award causing substantial injustice." (*Moncharsh*, *supra*, 3 Cal.4th at p. 28.) In other words, "[a] provision requiring arbitrators to apply the law leaves open the possibility that they are empowered to apply it 'wrongly as well as rightly.' " (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1360.)

Here, the parties agree that the arbitrator had the power to resolve their dispute over the purchase orders. Relying on the broad arbitration language included in its own purchase orders, MiaSolé argued before the trial court that the dispute should be arbitrated. It thus granted the arbitrator broad power to decide all issues of fact and law. (*Moncharsh*, *supra*, 3 Cal.4th at p. 28.) Moreover, MiaSolé actually presented to the arbitrator the same legal argument under California Uniform Commercial Code section 2709, subdivision (2) it raises here—namely, that Quadrant was obligated to "hold" the completed mag packs for MiaSolé to recover—which the arbitrator considered and rejected. Although MiaSolé does not agree with that decision, the arbitrator was clearly within the powers provided to him by the parties to resolve that legal issue and others that related to the dispute over the purchase orders. We have no legal authority to review that

conclusion or "the validity of the arbitrator's reasoning." (*Moncharsh, supra*, 3 Cal.4th at p. 11.)

MiaSolé also argues that the arbitrator's remedy was not "rationally related" to the contract and its breach and thus it exceeded the arbitrator's powers when the arbitrator awarded Quadrant damages without also ordering Quadrant to hold the products for MiaSolé's retrieval. In particular, MiaSolé claims Quadrant received a wrongful "windfall" by both receiving damages and retaining the products, which would not have occurred had the contract been fully performed.

MiaSolé's arguments ignore the broad authority granted to arbitrators, including their authority to fashion a remedy. The arbitrator was not required to assess only those damages that could be obtained through full performance of the underlying contract. "No exact correspondence is required between the rights and obligations of a party had the contract been performed and the remedy an arbitrator may provide for the other party's breach." (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 382.) Parties to an arbitration contract have the authority to restrict the arbitrator's remedial authority. But, if they choose to do so, they must "set out such limitations explicitly and unambiguously in the arbitration clause." (*Id*. at p. 383.) In the absence of any such restriction, arbitrators "enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of arbitration, so long as the remedy may be rationally derived from the contract and the breach." (*Ibid*.)

MiaSolé drafted the broad arbitration clause in its own purchase orders, which contains no restriction on the remedies available to the arbitrator. For example, the arbitration clause "did not limit the arbitrator to granting only that relief or applying only those defenses available in a court of law." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1187.) Thus, under California law, the remedy selected by the arbitrator need only be "fair and just" and "rationally derived from the contract and the breach." (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 383.)

The relief selected by the arbitrator was rationally related to MiaSolé's breach of the contract. The damage award accounted for Quadrant's failure to manufacture all of the mag packs by not requiring MiaSolé to pay for the mag packs not yet completed. It also reduced the amount it ordered MiaSolé to pay both by the amount that Quadrant would have had to pay for shipping the completed mag packs—consistent with the terms of the purchase orders—and by the amount MiaSolé had already paid Quadrant. With respect to the decision that Quadrant need not provide any of the completed mag packs to MiaSolé, that determination was also rationally related to the realities of the breach. By the time of the arbitration, Quadrant had had possession of the mag packs for nearly a year and a half; the mag packs had no salvage or resale value; and MiaSolé's own executive testified that MiaSolé had no plans of reinstating delivery dates for them. We conclude, as did the trial court, that MiaSolé's argument that "the remedy employed by the Arbitrator is not rationally related to the breach is not persuasive."

MiaSolé also appears to argue that the arbitrator's award violated the American Arbitration Association's (AAA) Rules for Commercial Arbitration—in particular, MiaSolé quotes extensively from AAA Commercial Rule 4(e)(iv)—because Quadrant's continued retention or possession of the mag packs was not "specified" in Quadrant's initial arbitration filing. Based on the record before us, however, MiaSolé did not raise this argument in the trial court, and it is therefore waived. (See *Bialo v. Western Mutual Insurance Co.* (2002) 95 Cal.App.4th 68, 73.)

In any event, we are doubtful of the merits of MiaSolé's claim. The particular AAA rule quoted by MiaSolé simply provides that a party may decrease or increase its "claim or counterclaim" at "any time prior to the close of the hearing or by the date established by the arbitrator." It does not foreclose the remedy the arbitrator awarded. The AAA's Commercial Rules agreed to by the parties here authorize an arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable," a rule which the arbitrator expressly relied on in his award. We have already concluded that the remedy

selected by the arbitrator was "rationally derived from the contract and the breach." (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 383.) We reject MiaSolé's contention that the trial court erred in finding that the arbitrator acted within his powers in fashioning the remedy in the award.[7]

2. Fraud

MiaSolé also seeks to vacate the arbitration award under section 1286.2(a)(1), which provides that a court may vacate an arbitration award if "[t]he award was procured by corruption, fraud or other undue means." (§ 1286.2(a)(1).) Specifically, MiaSolé contends that Quadrant committed fraud when one of its witnesses lied about the number of mag packs Quadrant had completed prior to MiaSolé's stop-work order. MiaSolé points to the testimony of a Quadrant employee who testified in a prehearing deposition that two of the three purchase orders had been completed and that the third purchase order was "approximately 70 percent complete." MiaSolé claims this testimony was "perjured" because MiaSolé later uncovered "evidence" that, in fact, "Quadrant did not complete manufacture" of the number of mag packs Quadrant had claimed in the arbitration."[8]

In the context of challenges to arbitration awards under section 1286.2(a)(1), "fraud" is limited to "extrinsic" fraud rather than "intrinsic" fraud. "Not every incidence of fraud will be allowed a remedy; vacation of an award will lie only for occurrences of 'extrinsic' fraud and not for 'intrinsic' fraud. 'Extrinsic' fraud is that conduct which

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[7] MiaSolé suggests in the conclusion of its opening brief that its "Constitutional due process" right may have been violated, but it provides no citation or authority supporting this argument. MiaSolé has therefore waived this contention. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

[8] The record on appeal does not contain a transcript of the arbitration hearing. However, the arbitration award referenced similar testimony in its conclusion that "the weight of the evidence supports Claimant's contention that production was finished on all the mag packs ordered on March 19 and April 1, with 70 per cent of the units under the April 8 Purchase Order also ready to ship, when MiaSolé's June stop-work email arrived."

'results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice.' " (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147 (*Pacific Crown Distributors*), citations and fn. omitted; see also *Baker Marquart LLP v. Kantor* (2018) 22 Cal.App.5th 729, 739–740 [discussing extrinsic fraud].) "Only extrinsic fraud which denies a party a fair hearing may serve as a basis for vacating an award." (*Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 825.)

MiaSolé concedes that the claimed perjury of a witness—the basis of its fraud claim against Quadrant—constitutes intrinsic fraud. Relying on a discussion of section 1286.2(a)(1) in *Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810 (*Pour Le Bebe*), MiaSolé nevertheless claims that perjury may amount to fraud that justifies vacating an arbitration award when the fraud was not "discoverable" prior to the arbitration. In *Pour Le Bebe*, the court described a three-part test used by federal courts "to determine whether an arbitration award should be vacated for fraud. 'First, the movant must establish the fraud by clear and convincing evidence. [Citations.] Second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration. [Citations.] Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration. [Citations.].' " (*Id*. at p. 821, quoting *Bonar v. Dean Witter Reynolds, Inc.* (11th Cir. 1988), 845 F.2d 1378, 1383.)

However, *Pour Le Bebe* does not help MiaSolé in its effort to attack the arbitration award. The court in *Pour Le Bebe* did not adopt or even apply this three-part test when construing "fraud" under section 1286.2(a)(1). (*Pour Le Bebe, supra,* 112 Cal.App.4th at pp. 832–833.) Rather, the court analyzed the phrase "undue means" in section 1286.2(a). (*Id.* at pp. 825–826.) In particular, the court examined whether an attorney's potential conflict of interest constituted "undue means" to vacate an arbitration award. (*Id*. at p. 826.)

Ultimately, the court in *Pour Le Bebe* focused on whether the party "had an opportunity to discover and reveal the alleged undue means at the arbitration hearing." (*Pour Le Bebe, supra*, 112 Cal.App.4th at p. 833, italics omitted.) Although the court found that there was no such opportunity to discover the conflict of interest at the hearing, it still ultimately ruled against the party seeking to vacate the arbitration award, holding that the party "failed to show by clear and convincing evidence that a conflict existed and that it had a substantial impact on the panel's decision." (*Id.* at p. 837.)

We determine that MiaSolé has failed to demonstrate a basis for vacating the award under section 1286.2(a)(1). Even if one could characterize the Quadrant employee's testimony at the arbitration hearing as presenting falsely inflated numbers of the mag packs manufactured, this evidence would constitute intrinsic fraud. (*Kachig v. Booth* (1971) 22 Cal.App.3d 626, 634 ["[T]he California cases uniformly hold that the introduction of perjured testimony or false documents in a fully litigated case constitutes intrinsic rather than extrinsic fraud."].) As such, it does not justify vacating the arbitration award. (*Pacific Crown Distributors, supra*, 183 Cal.App.3d at p. 1147.)

Furthermore, unlike the litigant in *Pour Le Bebe*, MiaSolé had an opportunity to cross-examine or otherwise rebut the testimony of the Quadrant employee it claims committed perjury. The transcript of the deposition reveals that MiaSolé's counsel deposed the employee on the number of mag packs completed. MiaSolé could have asked further questions at the deposition to investigate the employee's statements, or cross-examined him at the hearing, or even offered rebuttal evidence from its own witnesses or other witnesses. Moreover, although MiaSolé claims it was curbed by the arbitration rules and a purportedly compressed discovery schedule of "less than three (3) months" from conducting a "site inspection" or traveling to China to depose employees there, it does not state that it was foreclosed from engaging in other investigation or due diligence, such as interviews of other potential witnesses to rebut the allegations and evidence proffered by Quadrant. In addition, MiaSolé's complaints on appeal about the

compressed nature of arbitral discovery are undercut by its own petition to the trial court to move its contract dispute with Quadrant to arbitration in the first place.

Finally, effectively conceding that it has failed to show clear and convincing evidence of fraud, MiaSolé nevertheless claims that it "could have" shown "clear and convincing evidence of perjury" if the trial court had allowed certain limited discovery such as a "limited site inspection."[9] However, MiaSolé does not cite any authority that allows a trial court to order such discovery in the context of the court either confirming or vacating an arbitration award after the award has issued. MiaSolé relies largely on the catch-all "inherent powers" of the trial court to control the proceedings before it as justification. But MiaSolé provides no authority supporting a trial court's use of its "inherent powers" to order discovery in a matter where arbitration has already concluded. Accordingly, MiaSolé has not persuaded us that the trial court committed error by refusing MiaSolé's request for additional discovery.

3. Correction of the Award Under Section 1286.6(b)

In the alternative, MiaSolé argues that the award should be corrected under section 1286.6(b), which states in pertinent part that "[t]he court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that: [¶] . . . [¶] The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted." (§ 1286.6, subd. (b).) Although section 1286.6 provides for correcting the award rather than vacating it in its entirety, the standard for determining whether an arbitrator "exceeded" his powers is identical under both statutes. "[A]rbitrators do not 'exceed[ ] their powers within the meaning of section 1286.2 . . . and section 1286.6, subdivision (b)

[9] Neither the trial court's order denying MiaSolé's petition to vacate or correct the award nor the reporter's transcript contains any ruling by the trial court regarding MiaSolé's purported request for "limited discovery." We assume, since Quadrant does not contest its occurrence, that the trial court issued such a ruling.

merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the of the controversy submitted to the arbitrators." (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.)

In asserting that the arbitrator "exceeded" his powers under section 1286.6(b), MiaSolé uses the same arguments discussed above in the context of vacating the award under section 1286.2(a)(4), contending that the arbitrator's chosen remedy was legally wrong. We have already rejected these contentions. Accordingly, the trial court did not err in refusing to correct the award under section 1286.6(b).

B. *The Order Denying the Motion for New Trial*

MiaSolé also appeals the trial court's order denying its motion for a new trial. MiaSolé argues that it was entitled to a "new trial" pursuant to section 657, subdivision (4), because it provided "newly discovered evidence" in the form of an "admission" by an employee for a factory working for Quadrant that the mag packs had not been completely manufactured. MiaSolé further contends that this evidence satisfies the requirements of section 657 because the evidence was new, material, and "could not have been discovered and produced at the motion to vacate hearing by the exercise of reasonable diligence." Among other arguments, Quadrant responds that MiaSolé's motion for a new trial was procedurally improper because MiaSolé's only avenue to attack the arbitration award was through its motion to vacate or correct the award.

A trial court has "broad discretion in ruling on a motion for new trial," and its ruling "is accorded great deference on appeal." (*Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640, 645–646.) "But where a question of statutory construction is presented in the course of the review of a discretionary decision, such issues are legal matters subject to de novo review." (*Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912, 921.) Whether a party challenging an arbitration award may do so pursuant to a motion for new trial is a question of statutory construction subject to de novo review.

Section 657 sets out conditions under which "[t]he verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party." (§ 657.) Section 657 does not appear in Title 9 of the Code of Civil Procedure, which "represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280 et seq.)" (*Royal Alliance*, *supra*, 2 Cal.App.5th at pp. 1104–1105.) Judicial review of private arbitration awards is limited to "those cases in which there exists a statutory ground to vacate or correct the award." (*Moncharsh*, *supra*, 3 Cal.4th at p. 28.) This review is "ordinarily limited to the statutory grounds for vacating an award under section 1286.2 and correcting an award under section 1286.6." (*ECC Capital*, *supra*, 9 Cal.App.5th at pp. 899–900, citations omitted.)

MiaSolé cites to *Carney v. Simmonds* (1957) 49 Cal.2d 84 (*Carney*) to argue that it may challenge the award through a motion for new trial because such a motion may be made "following any proceeding that resulted in a judgment." In *Carney*, the court held that a motion for new trial was properly granted in the context of a judgment in the trial court relating to the parties' pleadings where no trial had yet occurred. (*Carney*, *supra*, 49 Cal.2d at pp. 87–88.) However, *Carney* did not involve or address arbitration. (*Ibid*.)

MiaSolé points us to no case holding that arbitration awards are subject to judicial review pursuant to a motion made under section 657. In the absence of any statutory authority or case law supporting MiaSolé's contention, we conclude that section 657 has no application to arbitration awards. MiaSolé's sole option for judicial review of the award —which it exercised—was to move to vacate or correct it under sections 1286.2 or 1286.6. (*ECC Capital*, *supra*, 9 Cal.App.5th at pp. 899–900.) We reject MiaSolé's contention that the trial court erred in its denial of MiaSolé's motion for new trial.[10]

[10] Based on this conclusion, we do not address whether MiaSolé has shown that the declaration underlying its motion for new trial was admissible, or that such

C. *MiaSolé's Motion for Leave to Produce Additional Evidence on Appeal*

Pursuant to section 909, MiaSolé requests that we take additional evidence on appeal in the form of a declaration from the President and Chief Executive Officer of a magnetic assembly manufacturer in China, which MiaSolé claims shows the award was "procured by fraud." Quadrant responds that section 909 does not apply, because the statute provides that "the reviewing court may make factual determinations contrary to or in addition to those made by the trial court," and the trial court did not make any factual findings. Quadrant also argues that the motion should be denied because it improperly asks this court to reexamine the arbitrator's award and to weigh conflicting evidence.

Section 909 provides this court with the discretionary authority to take evidence and to sit as a trier of fact. It states, "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues." (§ 909; see also Cal. Rules of Court, rule 8.252(b) ["A party may move that the reviewing court make findings under Code of Civil Procedure section 909."].)

"evidence" was new, material, and could not have been discovered and produced at the motion to vacate hearing by the exercise of reasonable diligence as required under section 657, subdivision (4).

The California Supreme Court has directed that appellate courts' authority to make findings of fact under section 909 "should be exercised sparingly" and, "[a]bsent exceptional circumstances, no such findings should be made." (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 (*Zeth S.*).) In addition, "[t]he power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings." (*Philippine Export & Foreign Loan Guarantee Corporation v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090.) The Supreme Court has concluded in another context that the possibility that a party committed perjury during trial does not constitute an exceptional circumstance. (See *Zeth S.*, *supra*, at pp. 405–407 [reviewing an appellate court's use of post judgment evidence in a dependency case].)

We reject Quadrant's contention that section 909 is inapplicable here. Under its plain language, section 909 permits the taking of additional evidence for any purpose "in the interests of justice." (§ 909.) The section further encourages the taking of additional evidence when doing so will allow a cause to "be finally disposed of by a single appeal." (*Ibid.*) We therefore conclude that section 909 would provide us with the authority to take evidence, even though the trial court did not make factual findings. Nevertheless, we agree with Quadrant that the motion to take additional evidence should be denied.

MiaSolé acknowledges that the power to take additional evidence under section 909 is to be used "sparingly" but argues that its request "does not ask this Court to weigh evidence or to invade the province of the trial court." To the contrary, that is exactly what MiaSolé is asking this court to do in the form of assessing this new declaration to determine whether the underlying arbitration award was procured by fraud. Even assuming arguendo that this new declaration is admissible,[11] MiaSolé has not convinced

[11] Although we need not reach the question of the declaration's admissibility, we note its deficiencies. For example, the declaration does not contain the required "under penalty of perjury" attestation. (§ 2015.5) In addition, the exhibits to the declaration

us that this situation constitutes an "exceptional circumstance[ ]." (*Zeth S., supra,* 31 Cal.4th at p. 405.)

Further, MiaSolé's request that this court delve into this new declaration, weigh the evidence, and relitigate issues that have been arbitrated would undermine the longstanding view that "[t]he arbitration's decision should be the end, not the beginning, of the dispute." (*Moncharsh*, *supra,* 3 Cal.4th at p. 10.) We are mindful that " '[b]ecause the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration.' " (*Richey*, *supra*, 60 Cal.4th at p. 916, quoting *Moncharsh*, *supra*, 3 Cal.4th at p. 10.) In light of these principles, we decline to exercise our discretionary power under section 909 to admit the declaration.

III. DISPOSITION

The judgment confirming the arbitration award is affirmed. The trial court's order denying MiaSolé's motion for a new trial is also affirmed. MiaSolé's motion under section 909 is denied. Quadrant is entitled to costs on appeal.

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appear to contain Chinese characters, and MiaSolé has not provided a certified translation of these statements. (Evid. Code §§ 751, 753.)

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

Quadrant Technology Corp. v. MiaSole Hi-Tech Corp.
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